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MOHD FAIZ ISMAIL v. PP

HIGH COURT SABAH & SARAWAK, SANDAKAN
CELESTINA STUEL GALID J
[CRIMINAL APPEAL NO: SDK-42JSK S(A)-1-3-2022]
22 FEBRUARY 2023

B

Abstract – *The age of a child is an element to be proved for the offence under s. 14(a) of the Sexual Offences Against Children Act 2017 ('Act'). The Act requires the court to make a finding that the victim is under 18 years of age and such finding must be premised on actual evidence such as a birth certificate or the National Registration Identity Card. Failure to establish the victim's case would be detrimental to the prosecution's case.*

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CRIMINAL PROCEDURE: *Appeal – Conviction and sentence – Appeal against decision of Sessions Court – Accused charged for physical sexual assault on child – Touching part on body of child for sexual purposes – Accused convicted for offence and sentenced to seven years' imprisonment and one stroke of whipping – Whether ingredients of offence established – Whether conviction and sentence safe – Sexual Offences Against Children Act 2017, s. 14(a)*

E

CRIMINAL PROCEDURE: *Charge – Defective – Typographical error – Accused charged for physical sexual assault on child under s. 14(a) of Sexual Offences Against Children Act 2017 – Charge cited 'section 14(A)' instead of 'section 14(a)' – Whether accused misled in any way by error – Whether charge sufficiently described notwithstanding error –Whether mere technical irregularity which was curable – Criminal Procedure Code, ss. 156 & 422*

F

CRIMINAL LAW: *Offences – Physical sexual assault on child – Accused charged for physical sexual assault on child by touching part on body of child for sexual purposes – Whether age of child established – Whether child under 18 years of age during commission of offence – Sexual Offences Against Children Act 2017, s. 14(a)*

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The appellant was a schoolteacher while the complainant ('PW1') was his student. According to PW1: (i) at 7am in July 2019, the appellant had asked her to have sexual intercourse with him and, when she said 'no', the appellant approached her and fondled her breasts with his hands; (ii) the

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incident took place in one of the rooms ('Bilik Kelompok') in the counselling room of the school. PW1 had gone to the room upon the instruction of the appellant and no one else was there; and (iii) on her way out, PW1 bumped into the school's counselling teacher ('PW2') who was about to enter the room. PW2 asked PW1 as to why she was in a hurry but the latter did not

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respond as she was in distress. PW1 lodged a police report four months later and the appellant was charged at the Sessions Court, for physical sexual assault on a child *ie*, by touching a part on the body of a child for sexual

purposes, an offence under s. 14(a) of the Sexual Offences Against Children Act 2017 ('Act'). The appellant had submitted an alibi to the prosecution, prior to the commencement of the trial, by stating his whereabouts at 7am in July 2019 and providing six names as his alibi witnesses. At the conclusion of the trial, the appellant was sentenced to seven years' imprisonment and one stroke of whipping. Hence, the present appeal. In support of his appeal, the appellant submitted that: (i) the charge was bad and defective as there was no s. 14(A) in the Act; (ii) the fact that PW1 was allegedly aged 17 years old and 11 months at the time of the offence had not been established during the trial; (iii) there was no evidence led to show that the appellant had opened the door to the counselling room and the Bilik Kelompok; and (iv) the investigating officer did not conduct a proper and impartial investigation of the case and this had gravely prejudiced the appellant.

Held (allowing appeal):

(1) The charge had cited 'section 14(A)' instead of 'section 14(a)'. The Sessions Court Judge ('SCJ') noted the error and used his direction to amend the same. It was not the appellant's case that he had been misled in any way by the typo-error. Indeed, the appellant could hardly contend as such as there was no s. 14(A) in the Act and there was only s. 14(a) instead. Furthermore, it was clearly stated in the charge that the offence was '… melakukan amang seksual fizikal ke atas kanak-kanak dengan cara meraba payudara bagi maksud seksual seorang kanak-kanak perempuan …'. This sufficiently described the offence notwithstanding the typo-error. This amounted to a mere technical irregularity which was curable under ss. 156 and 422 of the Criminal Procedure Code. (paras 4, 6 & 7)

(2) It is specified under s. 2(1) of the Act that the Act shall apply to a child who is under the age of 18 years. It was this immediately apparent that the age of the victim was an essential element to be proved in cases where the charge was framed under the Act. However, the prosecution did not tender PW1's birth certificate, her National Registration Identity Card nor called either of her parents to testify on this issue. Therefore, the prosecution had not established the element of the offence *ie*, that it was perpetrated against a child within the meaning of the Act. The conviction was not safe and it was liable to be set on this ground alone. (paras 17, 19, 23 & 34)

(3) Bearing in mind PW1's specific allegation that the offence occurred in the Bilik Kelompok, it was insufficient for the prosecution to merely lead evidence that the main door to the counselling room was already opened. It was incumbent upon the prosecution to also lead evidence that the Bilik Kelompok was already opened at the material time as there was uncontroverted evidence from PW2 that she had locked it the day

A before. Given that none of the teachers, who also had the keys to the counselling room and/or the Bilik Kelompok, were called to testify on this issue, there was no support for the prosecution's assertion that (i) other teachers, apart from PW2 could have opened the Bilik Kelompok; and (ii) PW2 could have opened the Bilik Kelompok and
B gone out again as PW2 never testified that. (paras 38-40)

(4) There was no evidence by the investigating officer as to what her investigation on the statements by the alibi witnesses had shown or whether the alibi witnesses supported the appellant's alibi or otherwise. Neither were any of the alibi witnesses called as a prosecution's witness.
C The nett result was that there was no evidence from the prosecution on the investigation which went towards disproving the appellant's alibi. (para 49)

(5) The appeal was allowed and the conviction and sentence were set aside. The appellant was discharged and acquitted of the charge against him.
D (para 59)

Case(s) referred to:
Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Dato' Yap Peng v. PP [1993] 2 CLJ 181 HC ***(refd)***
Duis Akim & Ors v. PP [2013] 9 CLJ 692 FC ***(refd)***
E *Henry Chan Kok Loon v. PP [2017] 1 LNS 1174 CA* ***(refd)***
Hj Abdul Ghani Ishak & Anor v. PP [1981] 1 LNS 96 FC ***(refd)***
Jason Chan Huan Sen & Ors v. PP [2015] 2 CLJ 605 CA ***(refd)***
Jamaluddin Hashim v. PP [1999] 3 CLJ 640 HC ***(refd)***
Lim Bua v. Ng Kian Heng [1993] 2 CLJ 461 HC ***(refd)***
F *Mathivanan Mahathevan v. PP [2018] 2 CLJ 469 HC* ***(refd)***
Mohan Singh Lachman Singh v. PP [2002] 3 CLJ 293 CA ***(refd)***
Mohd Faiz Ismail v. PP [2022] 1 LNS 3146 HC ***(refd)***
Mohd Nazri Omar & Ors v. PP [2014] 1 LNS 576 CA ***(refd)***
Mohd Salleh MK Mohd Yusof v. PP [2005] 2 CLJ 655 CA ***(refd)***
PP lwn. Mohd Sukri Mohd Hasan [2022] 1 LNS 1941 HC ***(dist)***
G *Shanmugam v. PP [1962] 1 LNS 186 HC* ***(refd)***
Thee Lian Iuan lwn. PP [2016] 10 CLJ 674 HC ***(dist)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 156, 173(i)(m), 402A, 422
Evidence Act 1950, s. 114(e)
H National Registration Regulations 1960 (repealed), reg. 5(2A)
Penal Code, s. 375
Sexual Offences Against Children Act 2017, s. 2(1), 14(a)

For the appellant - Hamid Ismail; M/s Hamid & Co
For the respondent - Ng Juhn Tao Deputy; DPP

I *Reported by Najib Tamby*

JUDGMENT

Celestina Stuel Galid J:

Introduction

[1] The appeal was by the accused against the conviction and sentence by the Sessions Court for a charge under s. 14(a) of the Sexual Offences Against Children Act 2017 ("the Act"). He was sentenced to seven years imprisonment and one stroke of whipping.

Preliminary Issue – Whether Charge Was Defective

[2] The appellant had included this as one of the grounds of his appeal, however, I was of the view that it was appropriate to deal with it as a preliminary issue as in the event it was resolved in the appellant's favour, the rest of the grounds on the merits of the appeal would be rendered academic.

[3] The crux of the appellant's contention on this issue was that instead of citing "s. 14(a)", the charge made reference to "s. 14(A)" which, according to learned counsel was bad and defective as it was an offence unknown in law, citing the case of *Mathivanan Mahathevan v. PP* [2018] 2 CLJ 469.

[4] Indeed, there was no dispute that the charge had cited "s. 14(A)" instead of "s. 14(a)". In his grounds of judgment, the learned Sessions Court Judge ("the LSCJ") noted the "error" and used his "discretion" to amend it accordingly.

[5] The first question for this court was, whether the appellant could be said to have been misled by the said error. In this regards, ss. 156 and 422 of the Criminal Procedure Code ("the CPC") were relevant. They are reproduced below:

> 156. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission.
>
> ...
>
> 422. Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of:
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;
>
> (b) the want of any sanction; or
>
> (c) the improper admission or rejection of any evidence,
>
> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[6] Notably, it was not the appellant's case that he had been misled in any way by the typo-error. Indeed, the appellant could hardly contend as such as there was no s. 14(A) in the Act and that there was only s. 14(a) instead.

[7] Furthermore, it was clearly stated in the charge that the offence was "... melakukan amang seksual fizikal ke atas kanak-kanak dengan cara meraba payudara bagi maksud seksual seorang kanak-kanak perempuan ..." These sufficiently described the offence notwithstanding the typo-error. I was of the view that this amounted to a mere technical irregularity which was curable under ss. 156 and 422 of the CPC – see *Hj Abdul Ghani Ishak & Anor v. PP* [1981] 1 LNS 96; [1981] 2 MLJ 230 and I so held. Likewise, due to it being a technical irregularity, I was of the further view that the failure of the Sessions Court to adhere to s. 173(i) of the CPC did not vitiate the proceedings – see *Henry Chan Kok Loon v. PP* [2017] 1 LNS 1174; [2017] MLJU 1191.

The Complaint

[8] The complainant (PW1) testified that the appellant was her General Knowledge schoolteacher when she was studying for her Sijil Tinggi Persekolahan Malaysia. She claimed that the appellant had, at around 7 in the morning in July 2019, verbally asked her to have sexual intercourse with him but that she said "no" and that he had thereafter approached her and fondled her breasts using both of his hands.

[9] PW1 said the incident happened in one of the rooms ("Bilik Kelompok") in the counselling room of the school. She had gone in the said room after the appellant instructed her to do so. No one else was in the room at the time and the appellant had locked the door behind her. The whole incident lasted about five seconds.

[10] According to PW1, the appellant then threatened her not to tell anyone about it and that thereafter she left the room, feeling angry and ashamed of what had happened. On the way out, she bumped into the school counselling teacher, PW2 who was about to enter the said room. PW2 asked her why she was in a hurry but PW1 did not respond as she was feeling distressed at the time.

[11] On 14 October 2019, PW1 lodged a police report. She said she did not lodge the report earlier as she was afraid of the appellant and that she had only gathered up her courage after being aware of complaints made by other students against the appellant to PW2. PW1 went to see PW2 in September 2019 and informed her what the appellant had done. She also reduced her statement in writing which was produced at the trial.

The Decision Of The Sessions Court

[12] At the end of the prosecution's case, the Sessions Court held that a *prima facie* case was made out against the appellant. In his grounds of judgment, the LSCJ made a finding that PW1 was credible and unshaken

during cross-examination and that she did not make up the story to frame the appellant. The LSCJ found PW1's testimony in court to be consistent with the police report that she had lodged and the statement she gave to PW2.

[13] The LSCJ also found the evidence of PW2 that she saw PW1 coming out of the counselling room hastily and looking shocked and distressed to be corroborative of PW1's allegations.

[14] In rejecting the defence of the appellant, the LSCJ was not persuaded by the appellant's alibi that he could not have been at the scene of the crime around 7am in July 2019 during the school session. The LSCJ held that the alibi evidence was not precise enough to succeed.

The Grounds Of Appeal

[15] There were seven grounds of appeal in the petition of appeal which were summarised by learned counsel for the appellant as follows:

(i) The charge was bad and defective because there was no section 14(A) in the Sexual Offences against Children Act 2017.

(ii) The learned trial judge breached s. 173(i) of the Criminal Procedure Code for amending the charge after the ruling at the end of trial *via* grounds of judgment without consulting parties.

(iii) The learned trial judge's error for not subjecting the prosecution's evidence to the maximum evaluation test at the end of prosecution case.

(iv) The learned trial judge's error for holding that there was a *prima facie* case established at the end of prosecution case when the prosecution's evidence was not credible to establish a *prima facie* case.

(v) There was miscarriage of justice when the investigating officer did not conduct proper and impartial investigation of the case and this had gravely prejudiced the Appellant.

(vi) The learned trial judge breached s. 173(m)(i) of the Criminal Procedure Code for not treating the defence evidence and the whole evidence at the end of trial properly.

(vii) The learned trial judge's error for imposing manifestly excessive sentence against the accused in view of the circumstances of the case.

This Decision Of This Court

PW1's Age Not Established?

[16] The preamble to the Act reads as follows:

> An Act to provide for certain sexual offences against children and their punishment in addition to other sexual offences against children and their punishment in other written laws, and in relation to it to provide for the administration of justice for children and connected matters.

[17] It is specified under s. 2(1) of the Act that it shall apply to a child who is under the age of 18 years.

[18] There could be no doubt as to the application of the Act to only those under 18 years of age. This is evident in that, when debating the bill on the Act, the then Minister in the Prime Minister's Department was reported in the Hansard (see "*Rang Undang-Undang Kesalahan-Kesalahan Seksual 235 Terhadap Kanak-Kanak 2017*" DR. 3 April 2017 at p. 21) had stated:

> Fasal 2 menjelaskan bahawa rang undang-undang ini terpakai bagi kanak-kanak yang berumur di bawah 18 tahun. Fasal ini juga menyatakan bahawa apa-apa sebutan kepada kanak-kanak hendaklah termasuk orang yang dipercayai oleh seorang tertuduh bagi kesalahan di bawah rang undang-undang sebagai seorang yang berumur dibawah 18 tahun.
>
> *Penetapan umur kanak-kanak di bawah rang undang-undang ini sebagai seorang yang berumur di bawah 18 tahun agar selaras dengan Akta Kanak-kanak 2001 dan Artikel 2 Konvensyen Mengenai Hak Kanak-kanak (CRC) yang memberi takrif kanak-kanak sebagai seorang yang berumur 18 tahun ke bawah.*
>
> Memandangkan kesalahan seksual terhadap kanak-kanak merupakan satu kesalahan yang amat serius, maka kerajaan berhasrat untuk melindungi semua kanak-kanak tanpa mengira umur termasuk kanak-kanak yang berumur 16 hingga 18 tahun. Apatah lagi, lebih daripada 10 peratus mangsa bagi jenayah seksual tersebut adalah kanak-kanak berumur 16 hingga 18 tahun. (emphasis added)

[19] It is thus immediately apparent that the age of the victim is an essential element to be proved in cases where the charge is framed under the Act.

[20] The charge in the present case read as follows:

> Bahawa kamu pada sekitar bulan Julai 2019 lebih kurang jam 7.00 pagi bertempat di bilik kaunseling Sekolah Menengah Kebangsaan Elopura Bestari, Batu 11, di Daerah Sandakan, di Negeri Sabah telah didapati melakukan amang seksual fizikal ke atas kanak-kanak dengan cara meraba payudara bagi maksud seksual seorang kanak perempuan bernama [Name & NRIC stated] berumur 17 tahun 11 bulan pada masa kejadian. Oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 14(A) Akta Kesalahan-kesalahan Seksual terhadap Kanak-Kanak 2017 dan boleh dihukum di bawah Akta yang sama.

[21] As noted earlier, the LSCJ had later on amended the words "s. 14(A)" to "s. 14(a)".

[22] It was contended by learned counsel for the appellant that the fact that PW1 was allegedly aged 17 years old and 11 months at the time of the offence had not been established during the trial as the prosecution failed to lead any evidence to support it.

[23] It was not in dispute that the prosecution did not tender PW1's birth certificate and/or her National Registration Identity Card ("NRIC") or called either of her parents to testify on this issue. The investigating officer, PW5 merely testified that after she received the police report lodged by

PW1, she had classified the case as "suatu kesalahan amang seksual fizikal terhadap kanak-kanak" but did not elaborate on her evidence and neither did PW5 provide any support for her evidence that the offence involved a child.

[24] Citing the oft-quoted case of *Wong Swee Chin v. PP* [1980] 1 LNS 138; [1981] 1 MLJ 212, learned Deputy Public Prosecutor ("DPP") contended that PW5's said evidence was never challenged by the defence and therefore, the failure of the defence to cross-examine her on this issue meant that it was to be accepted. Respectfully, this submission completely ignored the fact that the burden is always on the prosecution to prove its case beyond reasonable doubt and it is not for the defence to fill in the gap in the prosecution's case. There was no burden placed on the appellant to draw the attention to PW5 as to what was lacking in her investigation during the cross-examination – see *Mohan Singh Lachman Singh v. PP* [2002] 3 CLJ 293; [2002] 3 MLJ 291.

[25] As noted above, the age of the child, in this case PW1, was an element to be proved in order for the offence under s. 14(a) of the Act to be considered. However, notwithstanding that it was so, in his grounds of judgment, the LSCJ merely held as follows:

> I hereby find that the victim PW1 was a child during the month of July 2019 the time in which the alleged incident of sexual assault was said to have happen. **From her testimony** she was below the age of 18 years of age at that time. Her age is not a matter of dispute here. (emphasis added)

[26] With respect, there was no basis for the LSCJ to have come to such finding. PW1 never testified as to what her age was at the time of the alleged offence. At the most, the only reference to PW1's likely date of birth was from the NRIC number stated in her witness statement which was "XXX". However, as will be shown below (see p. 30 below), no reliance could be had on the said statement.

[27] The Act requires that the court makes a finding that the victim is under 18 years of age. Such finding must be premised on actual evidence such as a birth certificate as decided in *Jamaluddin Hashim v. Public Prosecutor* [1999] 3 CLJ 640 or a NRIC issued under para. (2A) of reg. 5 of the National Registration Regulations 1960 (repealed by the 1990 Regulations) which required the date of birth to be included in identity cards issued under them as was held in *Mohd Salleh MK Mohd Yusof v. PP* [2005] 2 CLJ 655.

[28] The accused in *Jamaluddin Hashim* was charged for the offence of statutory rape under s. 375 of the Penal Code for which it was essential for the prosecution to prove that the victim was under 16 years of age at the time of the offence. The High Court held that:

> [2] It is the primary duty of the investigating officer, in cases of statutory rape, to ascertain that the age of the alleged victim was in fact below 16 years. He or she must get the strongest and best evidence available on this point ...

A [3] The investigating officer in this case ought to have had no difficulty in procuring indisputable evidence of age from either the parents of the alleged victim or the victim personally by asking for a copy of her birth certificate. In the event neither the victim nor the parents of the victim had a copy of her birth certificate, surely the parents would have known her date of birth and with such information in hand, the investigating
B officer could have applied for a certified copy of the birth certificate from the department responsible for the registration of births and deaths, pursuant to s. 32 of the Births and Deaths Registration Act 1957. The entry in the register or certificate of birth shall, pursuant to s. 33(1) of the same Act, be received as evidence without further or 370 other proof …

C **[29]** Learned DPP then submitted that this court may have regard to s. 114(e) of the Evidence Act 1950 and presume that the recording of PW1's NRIC details in the trial notes of proceeding ("NOP") by the Sessions Court as a "judicial and official act which have been regularly performed" and that the details had been verified including PW1's age. As admirable as the
D attempt by learned DPP to salvage the situation was, I found the submission to be quite far-fetched and amounted to stretching the applicability of s. 114(e) to include even relieving the prosecution the burden of proving their case beyond reasonable doubt. Respectfully, that is not supported by the law.

[30] Furthermore, I failed to see that any reliance could be made on the
E NOP as if one were to actually look at the NOP, the last four digits of the NRIC number of PW1 was recorded as "0170" instead of "0710" which was stated in PW1's witness statement. That by itself suggested that the recording of the NOP may not have been made with the benefit of the actual NRIC produced before the court. Such doubt could not in the circumstances be
F resolved in favour of the prosecution and relieved them of proving PW1's age. The case of *Lim Bua v. Ng Kian Heng* [1993] 2 CLJ 461 cited by the prosecution on this issue was of no assistance to the prosecution as it was a civil action.

[31] In addition, both the cases of *Thee Lian Iuan lwn. PP* [2016] 10 CLJ
G 674; [2016] MLJU 303 and *PP lwn. Mohd Sukri Mohd Hasan* [2022] 1 LNS 1941; [2022] MLJU 2009 were distinguishable as in both cases, the prosecution had tendered the NRIC of the victims unlike the present where the prosecution failed to do so.

[32] Here, the fact that PW1 was said to have been 17 years and 11 months
H at the time of the alleged offence meant that it was even more crucial that this element be established as it was only a matter of one month before the Act was inapplicable to PW1 (as compared to if she had been only five years old, for instance). To my mind, this ought to have prompted the prosecution to ensure that PW1's age was ascertained and the supporting evidence
I produced before the trial court. I was genuinely bewildered as to why this was not done so given that it does not take a herculean effort to obtain such information through the Jabatan Pendaftaran Negara.

[33] This court had noted in another case (see *Mohd Faiz Ismail v. PP* [2022] 1 LNS 3146) that there ought not be any stone left unturned in the investigation of cases involving sexual offences so that the victim is not subjected to further trauma in having to relive his or her experiences in court during the trial but only to have the accused discharged and acquitted at the end of the day on the ground that the investigation was incomplete. I held the same sentiment in this case.

[34] The above being the case, I found merits in the contentions by learned counsel for the appellant that the prosecution had not established the element of the offence *ie*, that it was perpetrated against a child within the meaning of the Act. It being an essential element to be proved under the charge, I was of the view that the conviction was not safe and it was liable to be set aside on this ground alone. However, for completeness, the rest of the issues raised by the appellant will be discussed below.

No Evidence Putting The Appellant At The Crime Scene

[35] The charge specified that the offence was committed in the counselling room at the school. However, based on the evidence of PW1 and PW5, the offence was allegedly committed in the Bilik Kelompok which was one of the rooms in the counselling room. This was supported by the photographs ("P1[a, b, c]") and the sketch plan ("P6"). The distinction was important as the Bilik Kelompok had its own door, which according to PW2 was locked at the end of each day.

[36] According to PW2, her daily routine upon arriving at the school was to open the main door to the counselling room but not the Bilik Kelompok. PW2 said she would then go to the teachers' room to punch in for the day and only thereafter return to the counselling room when her duty as a counselling teacher would start from 6.45am. Learned counsel also highlighted PW2's evidence that the appellant did not have a key to the counselling room and that only a few teachers had them.

[37] For the prosecution, it was submitted that the fact that the appellant did not have keys to the counselling room and the Bilik Kelompok did not mean that he could not have accessed them as the doors were already opened before 7am. It was suggested that the other teachers who had keys to the rooms could have opened the doors themselves and not only PW2.

[38] The problem with the contention by learned DPP was that no evidence was led to support it. What was certain based on the evidence of PW2 and even PW1 was that only the main door to the counselling room had been opened. However, bearing in mind PW1's specific allegation that the offence occurred in the Bilik Kelompok, it was insufficient for the prosecution to merely lead evidence that the main door to the counselling room was already opened. It was incumbent upon the prosecution to also

lead evidence that the Bilik Kelompok was also already opened at that material time as there was uncontroverted evidence from PW2 that she had locked it the day before.

[39] Given that none of the other teachers who also had keys to the counselling room and or the Bilik Kelompok were called to testify on this issue, there was no support for the prosecution's assertion that other teachers apart from PW2 could have opened the Bilik Kelompok.

[40] Likewise there was no support for the prosecution's contention that PW2 could have opened the Bilik Kelompok at 6.45am and gone out again as PW2 never testified to that effect. To the contrary, her evidence was that she saw PW1 coming out of the counselling room as PW2 was about to enter to start her duty for the day. PW1 also testified to the same.

[41] More importantly, PW1 had said that she had immediately gone out of the counselling room after the incident. She did not say that the appellant had left before she did thus suggesting that the appellant was either still in the counselling room and or the Bilik Kelompok. However, PW2 who said she bumped into PW1 as she was entering the counselling room, did not say that she saw the appellant in the counselling room and or the Bilik Kelompok. What PW2 did testify to was the following (Q/A19, PWS2):

> Apabila saya memasuki **pejabat Sekolah,** saya telah mendapati bahawa hanya Tertuduh yang berada di situ. Oleh demikian, saya telah mengesyaki bahawa Mangsa berada dalam keadaan marah disebabkan suatu perkara yang berkait dengan matapelajaran yang diajar oleh Tertuduh. (emphasis added)

[42] PW2 was consistent in the use of the words "pejabat kaunselling Sekolah" throughout her witness statement thus one would not be faulted to conclude that the difference in the choice of words must have been consciously made. In any event, there was no attempt by the prosecution to seek for PW2's clarification during the trial. The doubt as to whether PW2 saw the appellant in the school office or the counselling room office was not resolved.

Rejection Of The Appellant's Alibi

[43] The appellant had pursuant to s. 402A of the CPC submitted an alibi to the prosecution prior to the commencement of the trial. The alibi was tendered in court through PW5 and marked as exh. "D7". In his alibi, the appellant stated his whereabouts at 7am in July 2019 and provided a list of six names as his alibi witnesses. For the purpose of this appeal, the relevant part of the notice was the following:

> 3. Pada hari Rabu, Khamis dan Jumaat setiap di bulan Julai 2019, pada jam 7.00 pagi, anak guam kami berada di pagar sekolah bagi memantau kehadiran para pelajar sebelum beliau memasuki kelas tingkatan 6 untuk

mengajar. Adakalanya anak guam kami melakukan tugas ini di hari Isnin dan Selasa juga sebelum menghadiri perhimpunan sekolah dan perjumpaan persatuan.

[44] Section 402A of the CPC provides as follows:

(1) The Court shall, at the time the accused is being charged, inform the accused as to his right to put forward a defence of alibi.

(2) Where the accused seeks to put forward a defence of alibi, he shall put forward a notice of his alibi during the case management process.

(3) Notwithstanding subsection (2), where the accused has not put forward a notice of his alibi during the case management process, he may adduce evidence in support of an alibi at any time during the trial subject to the following conditions:

(a) the accused has given a written notice of the alibi to the Public Prosecutor; and

(b) the Public Prosecutor is given a reasonable time to investigate the alibi before such evidence can be adduced.

(4) The notice required under this section shall include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi.

[45] In *Duis Akim & Ors v. PP* [2013] 9 CLJ 692, the Federal Court had the occasion to restate the legal principles applicable to the defence of alibi, stating as follows:

[92] Now, the following legal principles on the defence of alibi are relevant in the present namely:

(i) 'the defence of alibi must preclude the possibility that the accused could have been physically present at the place of the crime or its vicinity at or about the time of its commission'. (See: *Regina v. Youssef* (1990) 50 A Crim R 1 at pp. 2-3);

(ii) the correct 'approach to be adopted in regard to an alibi defence, ... is to consider the alibi in the light of the totality of the evidence and the court's impression of the witnesses. If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable. The ultimate test, and there is only one test in a criminal case, is whether the evidence establishes the guilt of the accused beyond reasonable doubt'. (See: *Leve v. S* (CA & R 163/12) [2013] ZAECGHC 5 (31 January 2013) (South Africa);

(iii) as such 'it would be wrong to reason that if the evidence of the state witnesses, considered in isolation, is credible the alibi must therefore be rejected. The correct approach is to consider the alibi in the light of all the evidence in the case and the court's

A impressions of the witnesses and from that totality to decide whether the alibi might reasonably be true'. (See: *R v. Hlongwane* 1959 (3) SA 337);

(iv) "(O)nce the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis
B that the prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false." (See: *S v. Liebenberg* 2005 (2)
C SACR 355 (SCA);

(v) '(I)t is trite that once an accused person pleads an alibi he does not assume the burden to prove it is true. The onus is on the prosecution to prove by evidence the alibi is false and to place the accused squarely at the scene of crime'. (See: *Mutachi Stephen*
D *v. Uganda* (*supra*). The evidence of his alibi need only raise a reasonable doubt that he committed the crime. (See: *Lizotte v. The King,* 1950 Can LII 48 (SCC), [1951] SCR 115); and

(vi) the alibi of an accused does not have to be corroborated by independent evidence in order to raise a defence (See: *R v. Letourneau* [1994] BCJ No. 265 (QL) (CA), 61).

E

[46] Following the Federal Court's decision above, the first question in this court's mind was, what steps did the prosecution take to disprove the appellant's alibi and to place him at the counselling room?

[47] PW5's evidence on the alibi issue was brief to say the least. She
F merely said the following (Q/A27, PWS5):

S: Apakah siasatan yang kamu jalankan mengenai alibi Tertuduh?

J: Hasil daripada siasatan yang dijalankan, saya telah mendapati bahawa terdapat seorang saksi mata yang dapat mengaitkan Tertuduh kepada lokasi dan waktu kejadian sepertimana yang diadu
G oleh Mangsa. Saksi mata tersebut adalah Cikgu Salsiah Binti Salleh.

Berdasarkan keterangan saksi mata, faktor di mana Tertuduh dilihat oleh saksi mata tersebut dan juga tingkah laku luar biasa Mangsa sewaktu dia keluar dari tempat kejadian, maka saya telah menyimpulkan bahawa alibi Tertuduh dapat dipatahkan.

H

[48] It was only during cross-examination that PW5 added that upon receiving the alibi notice she had recorded the statements from the alibi witnesses. This statement contradicted her evidence-in-chief when PW5 expressly testified that she did not do any other investigation (Q/A28, PWS5) apart from what she had stated in p. 47 above.

I

[49] Still further, there was no evidence by PW5 as to what her investigation on the statements by the alibi witnesses had shown or whether the alibi witnesses supported the appellant's alibi in exh. "D7" or otherwise.

Neither were any of the alibi witnesses called as a prosecution witness. The net result was that there was no evidence from the prosecution on the investigation which went towards disproving the appellant's alibi.

[50] Only one of the alibi witnesses, DW3, testified for the defence. He was also a teacher in the school where the appellant taught and was the form 6 head discipline teacher. He said that in July 2019, he and the appellant manned the gate of the school to catch latecomers. Depending on the days, he would either be at the gate from 7am to 7.30am, and at times, until 6.55am or 8am DW3's evidence about him and the appellant manning the gate in the morning was supported by PW2's own earlier evidence during cross-examination.

[51] The LSCJ rejected DW3's evidence holding that DW3 was not entirely with the appellant at around 7am during the school days in July 2019. The LSCJ also held that DW3's evidence could not be relied on as it was "imprecise" and that DW3 did not state that the appellant would always be at the gate by 7am. According to the LSCJ, this left the possibility of the appellant being at the gate at a time later than 7am.

[52] Now, it must be borne in mind that the law only required the appellant to raise a reasonable doubt by his alibi defence (see *Duis*' case). Here, the appellant and DW3 testified that they manned the gate in the morning. Even PW2 agreed that they did so although she qualified her answer during re-examination that she did not see the appellant did so every day at 7am and that there were days when he was not at the gate. The statement by Hepworth J in *Shanmugam v. PP* [1962] 1 LNS 186; [1963] MLJ 125 came to mind where his Lordship said:

> Where the defence to a criminal charge is an alibi it was not necessary that the accused prove his alibi beyond reasonable doubt. All that he has to do is to case a doubt upon the prosecution story. It is not necessary for this to be achieved that the evidence of the accused should be corroborated.

[53] In my considered view, the evidence led by the appellant and DW3, being supported by the prosecution's own witness meant that the appellant had discharged the evidential burden so that the prosecution was bound to lead evidence to disprove it. This the prosecution failed to do despite PW2's said testimony.

[54] The prosecution's cross-examination of DW3 did not, in my view, do anything to disprove the alibi defence as the theory of the prosecution (as could be seen from the cross-examination of DW3) was only that there were times when DW3 was not at the gate so that he would not have known whether the appellant was there himself.

[55] At this juncture, it will be remembered that PW5 had supposedly taken the statements of the alibi witnesses. Thus, the prosecution would have had the benefit of DW3's statement to PW5 before he testified in court. However, DW3 was never confronted with his statement which could only suggest that there was never an investigation done by PW5 on DW3's statement. Had that been the case, the prosecution would not have had to put to DW3 that he did not produce his school's July 2019 attendance record (lines 3205 to 3207, NOP). To my mind, the prosecution themselves tendering the said attendance book would have been the very essence of what it meant for the prosecution to disprove the alibi but which the prosecution failed to do.

[56] Next, on the finding of the LSCJ that DW3's evidence was "imprecise". Firstly, it must be noted that the prosecution was itself imprecise as to the time of the alleged offence. The charge stated the time as "lebih kurang 7 pagi". PW1, PW2 and PW5 all testified to the same effect. However, in her written statement, exh. "P2(a-b)", PW1 stated the time as "7 pagi" while the time of the alleged offence was completely omitted in her police report, exh. "P3". Learned counsel was correct to contend that the LSCJ appeared to have placed the burden on the appellant through DW3 to lead evidence that he was at the gate "by 7am" when it was not the prosecution's case that the alleged offence occurred at that exact time.

Appellate Intervention Warranted

[57] At the risk of repeating what is now trite law, an appellate court is slow to disturb the findings of the lower court but will exercise the power to do so where, for instance, the findings of fact are against the weight of the evidence – see *Dato' Yap Peng v. PP* [1993] 2 CLJ 181; [1993] 1 MLJ 337; *Jason Chan Huan Sen & Ors v. PP* [2015] 2 CLJ 605; [2015] 1 MLJ 701. In such a case, the appellate court is entitled to disturb the trial court's findings of fact even though it is generally accepted that the latter would have the audio-visual advantage – *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800; [2009] 2 MLJ 613. Further, the power to intervene may be exercised if there was a misdirection of the law on the part of the lower court – see *Mohd Nazri Omar & Ors v. PP* [2014] 1 LNS 576; [2014] 5 MLJ 644.

[58] Given this court's findings above, I was of the view that there was basis for this court to exercise its appellate intervention. I was of the further view that it would be unsafe to sustain the conviction handed down by the Sessions Court.

Conclusion

[59] The appeal was allowed and the conviction and sentence set aside. The appellant was discharged and acquitted of the charge against him.